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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

SEATTLE UNIVERSITY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Seattle University responds to the petition of the United States Department of Education to review by writ of certiorari the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

Review on writ of certiorari should be granted only where there are special and

important reasons therefor. Rule 19, Supreme Court Rules. Respondent respectfully submits that no such special and important reasons exist under the facts of this case to justify granting the requested writ.

I.

THE SECOND CIRCUIT'S DECISION IN NORTH HAVEN IS NOT FINAL

In 1979 this Court denied petitioner's request for a writ of certiorari in other cases similar to this one. Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979). Petitioner reapplies citing conflict among the courts of appeal as the result of the

decision of the Second Circuit in North Haven Board of Education v. Hufstedler, Nos. 79-6136, 79-6247, and 79-7747 (2d Cir. July 24, 1980).

A petition for rehearing and request for hearing en banc has been filed in the North Haven case and is pending at the time of the preparation of this response. The Second Circuit may change its decision and agree with the other courts that have found the regulations in question invalid. If that were to occur, the basis for this petition would no longer exist.

The decision of the Second Circuit in North Haven is not final for the reason that a timely petition for rehearing is pending before that court. United States v. Healey, 376 U.S. 75 (1964). See United States v. Ellicott, 223 U.S. 524 (1911). This Court has ordinarily not issued a writ of certiorari based on

conflict between the courts of appeal until a final decree has been entered. American Construction Co. v. Jacksonville, Tampa & Key West R.R., 148 U.S. 372 (1892).

II.

NO CONTROVERSY EXISTS BETWEEN PARTIES

A complaint alleging sex-based discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, was filed with the Department of Health, Education and Welfare[1] ("HEW") on April 21, 1975 by certain faculty members of the University's School of Nursing. It was pursuant to this charge that HEW conducted the investigation which the University later sought to enjoin.

Shortly after the district court's decision granting the University's Motion

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[1] Now called the Department of Education.

for Summary Judgment and invalidating as to the facts of this case HEW's Title IX employment regulations, HEW notified Seattle University that it would continue its investigation of the underlying discrimination complaint under Executive Order 11246, as amended. Title IX of the Education Amendments of 1972 and Executive Order 11246, as amended, prohibit sex discrimination by educational institutions and federal contractors, respectively. Seattle University is both an educational institution and a federal contractor.

On March 23, 1979 HEW referred the complaint to the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") for investigation.[2]

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[2] This was a result of reorganization within federal agencies involving inter alia investigation of charges of unlawful discrimination under Executive Order 11246, as amended. This reorganization was done pursuant to Executive Order 12086, effective October 8, 1978 (43 F.R. 46501).

On August 17, 1979 OFCCP began an investigation of the allegations of sex discrimination set forth in the April 21, 1975 complaint.

OFCCP completed its investigation approximately eleven months later and on July 11, 1980, issued a "Notification of Results of Investigation." OFCCP found that there was insufficient evidence to conclude that Seattle University had violated its obligations under the nondiscrimination and affirmative action provisions of Executive Order 11246, as amended.

The complaint underlying HEW's investigation has been investigated by the federal government and found to be without merit.

Seattle University submits that these subsequent events render the case moot. There is no longer an actual controversy between the parties to this action.

This Court has held that the determination of whether a controversy exists is determined at the time the court considers a case, not as of the time it was filed. Roe v. Wade, 410 U.S. 113 (1973).

There being no actual controversy between the University and HEW at this time, the Court should deny the Government's request for writ of certiorari. U.S. Const. art. III, § 2; DeFunis v. Odegaard, 416 U.S. 312 (1974); Flast v. Cohen, 392 U.S. 83 (1968).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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